May 8, 1995

Honorable Wayne Carvalho
Chief of Police
County of Hawaii
349 Kapiolani Street
Hilo, Hawaii 96720

Dear Chief Carvalho:

Re: Public Access to General Order Nos. 528, 601, 602, 604, 606, 804, and 805

This is in reply to a letter from former Chief of Police Victor V. Vierra to the Office of Information Practices ("OIP") requesting an advisory opinion concerning the above-referenced matter.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the Hawaii County Police Department ("Department") must, upon request, make available for public inspection and copying the following general orders of the Department:

(1) General Order No. 528, "Transportation of Prisoners";
(2) General Order No. 601, "Firearms and Transportation of Prisoners Aboard Aircraft";
(3) General Order No. 602, "Motor Vehicle Pursuit";
(4) General Order No. 604, "Post Shooting Incident Procedures";
(5) General Order No. 606, "Arrest Policy";
(6) General Order No. 804, "Use of Force"; and
(7) General Order No. 805, "Use of Oleoresin Capsicum (OC) Spray."

BRIEF ANSWER

In OIP Opinion Letter No. 90-34 (Dec. 10, 1990), we examined whether agency policies and procedures that have not been adopted

as administrative rules under chapter 91, Hawaii Revised Statutes, must remain confidential in order to avoid the frustration of a legitimate government function.

We concluded that federal court decisions applying Exemption 2 of the federal Freedom of Information Act, 5 U.S.C. § 552 (1988) ("FOIA"), provided useful guidance in determining whether an agency's internal policies must remain confidential in order to avoid the frustration of a legitimate government function. In Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051 (D.C. Cir. 1981) (*en banc*), the court fashioned a two-part test for determining which sensitive materials are exempt from mandatory disclosure under Exemption 2. This test requires both that the requested document be "predominately internal" and that its disclosure "significantly risks circumvention of agency regulations or statutes." Id. at 1074. The concern in such a case is that a FOIA disclosure should not "benefit those attempting to violate the law and avoid detection." Id. at 1054.

Based upon our careful examination of the general orders in the facts presented, it is our opinion that the Department may withhold public access to General Order No. 528, and the following portions of General Order Numbers 602 and 805:

> Sections V and VI, General Order No. 602, "Motor Vehicle Pursuit"; and
>
> Subsections A, B, C, D, G, I, J, and K of Section IV, General Order No. 805, "Use of Oleoresin (OC) Spray."

In our opinion, the disclosure of these portions of General Order Numbers 602 and 805 could significantly risk the circumvention of law and undermine the effectiveness of police motor vehicle pursuit tactics and procedures for the use of chemical agents to disable violent subjects. As such, we conclude that the Department may withhold these portions of General Order Numbers 602 and 805 to avoid the frustration of a legitimate government function; however, other portions of General Order Nos. 602 and 805 should be segregated and made available for public inspection and copying.

Except as noted above, it is our opinion that the general orders involved in the facts presented should be made available for public inspection and copying.

FACTS

By letter dated March 31, 1994, Citizens for Justice

requested the Department to facilitate the public's access to the Department's general orders by making them available for public inspection and copying at the Hilo Public Library.

By letter to the OIP dated May 6, 1994, the Department indicated that it intended to make copies of its general orders available for public inspection and copying; however, the Department requested the OIP to provide it with an opinion concerning seven general orders, which the Department indicated may be protected from public disclosure under section 92F-13(3), Hawaii Revised Statutes. Except for those seven general orders, it is our understanding that the Department has made the remainder of its general orders available at public libraries and electronically on HAWAII FYI.

Each of the general orders that the Department would like to withhold from public disclosure is summarized below:

Transportation of Prisoners (General Order No. 528)

This general order sets forth procedures for the transportation of prisoners in order to protect the lives and ensure the safety of the officers, the public, and persons in custody, including procedures concerning motor vehicle inspections, handcuffing, pre-transportation searches, and procedures concerning loading prisoners into a vehicle.

Firearms and Transportation of Prisoners Aboard Aircraft (General Order No. 601)

This general order contains a summary of regulations adopted by the Federal Aviation Administration ("FAA") concerning the carrying of weapons aboard aircraft and FAA regulations and procedures for the transportation of prisoners.

Motor Vehicle Pursuit (General Order No. 602)

General Order No. 602 sets forth the Department's policies concerning the use of motor vehicles to pursue another vehicle when an occupant of the other vehicle is suspected to have violated the law, or when the driver of the other vehicle appears to have deliberately ignored lawful commands to stop.

General Order No. 602 also contains general considerations, restrictions on the use of pursuit, procedures concerning the initiation of pursuit, a description of pursuit tactics (including provisions concerning overtaking the other vehicle, or the use of roadblocks, lights, sirens and radio), and policies concerning the termination, and Departmental review, of motor

vehicle pursuits.

Post Shooting Incident Procedures (General Order No. 604)

This general order sets forth the procedures to be followed when Department officers are involved in a shooting incident, including supervisory responsibilities, general investigation procedures, provisions concerning the recovery of firearms and the removal of an officer from duty, family counseling, information management, firearm requalification, and stress recognition and referrals.

Arrest Policy (General Order No. 606)

The purpose of this general order is to cite statutory provisions for effecting an arrest and to establish guidelines for managing arrested persons. The general order sets forth sections of the Hawaii Revised Statutes applicable to making an arrest, procedures for releasing a person, notifications to arrested persons, the use of force, and controlling arrested persons as such, the use of handcuffs and restraining devices.

General Order No. 606 also contains provisions concerning: (1) police station searches, (2) booking and fingerprinting, (3) computer checks, (4) inventorying property, (5) the rights of the arrested person, (5) telephone calls, (6) custodial interrogations, (7) non-felony and felony charging decisions, (8) release pending investigation, (8) bail, (9) release on own recognizance, and (10) detention of prisoners.

Use of Force (General Order No. 804)

This general order sets forth provisions concerning the use of deadly and non-deadly force, and restrictions upon the use of firearms. It also sets forth provisions concerning the use of wooden batons, reporting requirements concerning the use of force, and departmental responses to incidents involving the use of force.

Use of Oleoresin Capsicum (OC) Spray (General Order No. 805)

This general order sets forth procedures concerning the use of oleoresin capsicum spray, including instructions on how to discharge the spray, a description of the physiological effects of OC spray, restrictions upon its use, post use decontamination and treatment procedures, and reporting requirements.

The Department provided the OIP with a copy of each of the above policies, which were attached to the Department's request

for an advisory opinion.

DISCUSSION

I. INTRODUCTION

The UIPA, the State's public records law, states "[e]xcept as provided in section 92F-13, each agency upon request by any person shall make government records available for inspection and copying during regular business hours." Haw. Rev. Stat. § 92F-11(b) (Supp. 1992). Under the UIPA, the term "government record," means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1992).

Additionally, we have previously observed that if a requested record contains both public information and information protected by one of the UIPA's exceptions, an agency must disclose any reasonably segregable portion of the record. See OIP Op. Ltr. Nos. 89-5 (Nov. 20, 1989); 90-8 (Feb. 12, 1990); 90-31 (Oct. 25, 1990); 91-1 (Feb. 15, 1991); Haw. Rev. Stat. § 92F-15(b) (Supp. 1992) (court may examine the government record at issue, in camera, to assist it in determining whether it, or any part of it, may be withheld) (emphasis added); Haw. Rev. Stat. § 92F-42(13) (Supp. 1992) (directing the OIP to adopt rules setting for the fees that may be charged by an agency for "segregating disclosable records").[1]

With these introductory principles in mind, we now turn to an examination of whether the Department's general orders at issue are protected from disclosure under section 92F-13(3), Hawaii Revised Statutes.

II. RECORDS THAT MUST BE CONFIDENTIAL IN ORDER TO AVOID THE

[1]An agency's duty to segregate disclosable from non-disclosable information is an elementary principle of most state open records laws and the federal Freedom of Information Act, 5 U.S.C. § 552(b) (1988) ("[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection"). Undoubtedly this casts a tangible burden on government agencies under the UIPA, however, as one court has observed "[n]othing less will suffice, if the underlying legislative policies of [an open records act] is to be implemented faithfully." Northern Cal. Police Practices, Etc. v. Craig, 153 Cal. Rptr. 173, 178 (Ct. App. 3d Dist. 1979).

FRUSTRATION OF A LEGITIMATE GOVERNMENT FUNCTION

Under section 92F-13(3), Hawaii Revised Statutes, an agency is not required to disclose "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function."

A. Agency Internal Policies That Are Not "Rules"

In OIP Opinion Letter No. 90-34 (Dec. 10, 1990) and OIP Opinion Letter No. 94-19, (Oct. 13, 1994) we examined whether agency policies and procedures that have not been adopted as rules under chapter 91, Hawaii Revised Statutes, must remain confidential in order to avoid the frustration of a legitimate government function.

We concluded that federal court decisions applying Exemption 2 of the federal Freedom of Information Act, 5 U.S.C. § 552 ("FOIA") provided useful guidance in determining whether an agency's internal policies must remain confidential in order to avoid the frustration of a legitimate government function. Exemption 2 of FOIA permits agencies to withhold records "related solely to the internal personnel rules and practices of an agency."

In Founding Church of Scientology v. Smith, 721 F.2d 828 (D.C. Cir. 1983), the leading case under FOIA's Exemption 2, the court articulated the following test for determining whether information is exempt under FOIA's Exemption 2:

> First, the material withheld should fall within the terms of the statutory language as a personnel rule or practice of the agency. Then, if the material relates to trivial administrative matters of no genuine public interest, exemption would be automatic under this statute. If withholding frustrates legitimate public interest, however, the material should be released unless the government can show that disclosure would risk circumvention of lawful agency regulation.

Scientology, 721 F.2d at 830 n.4.[2]

[2]Since the disclosure of trivial administrative matters of no genuine public interest generally would not result in the "frustration of a legitimate government function," we believe that in determining whether an agency's internal rule or practice is

In Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051 (D.C. Cir. 1981) (*en banc*), the court fashioned a two-part test for determining which sensitive materials are exempt from mandatory disclosure under Exemption 2. This test requires both that the requested document be "predominately internal" and that its disclosure "significantly risks circumvention of agency regulations or statutes." Id. at 1074. The concern in such a case is that a FOIA disclosure should not "benefit those attempting to violate the law and avoid detection." Id. at 1054.

A growing body of decisions has expressly applied both parts of this test, providing some guidance as to the kinds of information that will qualify for protection under these standards.

1. "Predominately Internal" Test

With respect to the first part of the Crooker test, in Cox v. Dep't of Justice, 670 F.2d 1 (D.C. Cir. 1979), the court provided specific guidance on what constitutes an "internal" document, holding protectible information which:

> [D]oes not purport to regulate activities among members of the public . . . [and] does [not] . . . set standards to be followed by agency personnel in deciding whether to proceed against or take action affecting members of the public. Differently stated, the unreleased information is not "secret law," the primary target of [the FOIA's] broad disclosure provisions.

Cox, 601 F.2d at 5.

In Cox, an inmate at a federal penitentiary made a FOIA request to the United States Marshals Service for a copy of the

(..continued)
protected from disclosure under section 92F-13(3), Hawaii Revised Statutes, the proper analysis is one that focuses upon whether disclosure of the policy significantly risks the circumvention of agency statutes or regulations, or the security of state correctional facilities and the safety of personnel employed therein. OIP Op. Ltr. No. 90-34. This is especially true since the federal courts have admonished that "a reasonably low threshold should be maintained for determining whether withheld administrative material relates to a significant public interest." Scientology, 721 F.2d at 830-31 n.4.

Manual for United States Marshals. After the inmate filed suit, the agency disclosed the manual after segregating or sanitizing portions of the manual dealing with the caliber of weapon and length of barrel on the weapon used by Marshals; the amount of ammunition they used; the number of rounds they are issued; the type of handcuffs they used, and the combinations matching the handcuffs; the place where the keys are secured; the radio transmission and receiving frequencies of operational units; arrangement of prisoners during transportation of the same, including the use of restraining devices; the position of weapons on security personnel while transporting prisoners; and the inspection of prisoners during transport for objects used to break open handcuffs.

The court in Cox held that the withheld portions of the manual satisfied the "predominately internal" test finding that such information "is of legitimate interest only to members of the Marshal's staff." Cox, 601 F.2d at 5.

In the Crooker case itself, the court found that portions of a manual providing instructions to law enforcement personnel were "predominately internal," even though might in some way affect the public at large:

> Obviously, the deleted portions of the manual, as with any "internal personnel rules and practices of an agency," have some effect on the public-at-large. As Judge Leventhal noted in *Vaughn II*, "there are few events in our society today that occur without so much as a tiny ripple effect outside their area of prime impact." 523 F.2d at 1150 (*Leventhal, J., concurring*). The critical considerations here, however, are that the manual is used for predominately internal purposes; it is designed to establish rules and practices for agency personnel, i.e., law enforcement investigatory techniques; it involves no "secret law" of the agency; and it is *conceded* that public disclosure would risk circumvention of agency regulations.

Crooker, 670 F.2d at 1073 (emphasis in original).

Similarly, in Windels, Marx, Davies & Ives v. Dep't of Commerce, 576 F. Supp. 405 (D.C.C. 1985), the court found that a computer program designed to detect possible violations of the law was predominately internal, recognizing a distinction between "instructions concerned with *detecting* illegal activity disguised

as legal activity, and guidelines which *define* a violation-and therefore disclosable as 'secret law.'" Id. at 412 (emphasis in original).

We believe that although the general orders involved in the facts presented may have some ancillary impact upon members of the public at large, they are nonetheless "predominately internal," in that they are intended to set forth instructions to Department police officers and set forth policies to which such officers must adhere in the performance of their duties.

2. Risk of Circumvention of Agency Statutes or Regulations Test

The second test set forth in the Crooker case is that disclosure of the record "significantly risks circumvention of agency regulations or statutes." 670 F.2d 1073-74. As the Court recognized, a disclosure should not "benefit those attempting to violate the law and avoid detection." Id. Or, as another court put it, disclosure of this information would be like "putting a fox inside the chicken coop." Windels, Marx, Davies & Ives v. Dep't of Commerce, 576 F. Supp. 405, 413 (D.D.C. 1985).

Federal courts have found a variety of information protected under this prong of the two-part Crooker test. For example:

a. information that would reveal the identities of informants[3];

b. information that would reveal undercover agents[4]; and

c. security techniques used in prisons.[5]

[3]See Lesar v. United States Dep't of Justice, 636 F.2d 472 (D.C. Cir. 1980).

[4]See Cox v. FBI, No. 83-3552, slip op. at 2 (D.D.C. May 31, 1984).

[5]See Powell v. Dep't of Justice, No. 86-2020, slip op. at 4 (D.D.C. Oct. 31, 1989)(records relating to prisoner security procedures); Crooker v. Federal Bureau of Prisons, No. 86-510, slip op. at 3-4 (D.D.C. Feb. 27, 1987) (general prison post orders, handcuff procedures, security and arming of officers, and alarm procedures); Cox v. Bureau of Prisons, No. 83-1032, slip op. at 1 (D.D.C. July 19, 1983) (disclosure of Central Inmate Monitoring Manual would create significant risk of circumvention of agency regulations designed to safeguard security of inmates).

Court decisions following Crooker indicate that an agency need not demonstrate that disclosure of internal personnel documents would risk the circumvention of a specific statute or regulation. Rather, these court decisions indicate that if disclosure of the documents "would render those documents operationally useless, the Crooker analysis is satisfied whether or not the agency identifies a specific statute or regulation threatened by disclosure," see NTEU v. U.S. Customs Serv., 802 F.2d 525, 530-31 (D.C. Cir. 1986), or where disclosure would "undermine legitimate enforcement or agency regulatory procedures." Wilder v. C.I.R. Service, 607 F. Supp. 1013 (D.C. Ala. 1985).

3. Application of Crooker Test to These Facts

We shall now examine whether each of the Department's general orders satisfies the two-part test set forth in the *Crooker* case and, therefore, may be withheld under section 92F-13(3), Hawaii Revised Statutes.

a. Transportation of Prisoners (General Order No. 528)

In OIP Opinion Letter No. 94-19, we concluded that a Department of Public Safety policy concerning the transport of inmates for court appearances could be withheld under section 92F-13(3), Hawaii Revised Statutes. We observed that federal courts have held protectible under exemption 2 of FOIA corrections policies concerning the transport of inmates. OIP Op. Ltr. No. 94-19 at 7-8. Accordingly, we believe that the Department may withhold from public inspection and copying General Order No. 528.

b. Firearms (General Order No. 601) and Transportation of Prisoners Aboard Aircraft

We do not believe that the disclosure of this general order would result in the frustration of a legitimate government function, since, based upon our examination of this general order, its provisions largely restate regulations adopted by the FAA. See 14 C.F.R. §§ 108.11, 108.21 (1994). These FAA regulations are publicly available at any library.

c. Motor Vehicle Pursuit (General Order No. 602)

In contrast to the above general orders, we do believe that the disclosure of portions of General Order No. 602 could significantly risk the circumvention of law, and significantly impede the effectiveness of the Department's law enforcement

efforts. Yet, the disclosure of sections I, II, III, and IV of General Order No. 602, entitled "Policy," "Definition," "General Considerations," and "Review of Motor Vehicle Pursuits" respectively, would not result in the frustration of a legitimate government function since they do not reveal any specific pursuit tactics and, thus, should be made available for public inspection and copying.

However, we believe that section V, entitled "Procedures," and section VI, entitled "Pursuit Tactics," may be withheld from public inspection and copying under section 92F-13(3), Hawaii Revised Statutes, because public access to these portions of the general order could create the significant possibility that individuals could undermine the effectiveness of motor vehicle pursuits conducted by the Department, and render the policy operationally useless.

Our conclusion in this regard is bolstered by a decision under the California Public Records Act. In Northern Cal. Police Practices Project v. Craig, 153 Cal. Rptr. 173 (Ct. App. 3d Dist. 1979), the court held that annexes to a general order of the California Highway Patrol ("CHP") that set forth CHP pursuit and other policies were protected from disclosure under an exemption for certain investigatory or security material. In contrast, the court upheld a trial court decision that CHP arrest policies and procedures, release from arrest, and handcuffing and search techniques were not protected from disclosure. The court remanded the case to the trial court for a determination of whether portions of the policies found to be protected contained reasonably segregable public information.

d. Post Shooting Incident Procedures (General Order No. 606)

This general order is mainly directed at the psychological needs of police officers who have been involved in a shooting incident, rather than at the detection of crime and the enforcement of the law. It sets forth certain provisions concerning supervisory responsibilities and the recovery of the officer's firearms after a shooting incident.

We do not believe that public access to this general order would permit those engaged in shooting incidents with police officers to avoid or elude detection or capture. Accordingly, we do not believe that disclosure of this general order would significantly risk circumvention of the law or significantly impede law enforcement efforts.

e. Arrest Policy (General Order No. 606)

The first two pages of this general order merely restate sections of the Hawaii Revised Statutes that are applicable to the making of an arrest.

The remainder of the policy sets forth provisions concerning notification of arrest, release from arrest, use of force, handcuffing procedures, transportation, police station searches,

booking, custodial interrogations, charging decisions, bail, and detention of prisoners.

We do not believe that the disclosure of this general order would result in the frustration of a legitimate government function of law enforcement, by permitting individuals to circumvent the law or evade arrest. Similar policies were found to be a public record in the Northern California Police Practices case discussed above.

f. Use of Force (General Order No. 804)

General Order No. 804 sets forth definitions of deadly and non-deadly force, and restrictions upon the use of such force. It also sets forth restrictions upon the type of weapons that may be carried by police officers, and training and qualification requirements. In addition, this general order contains provisions concerning the filing of reports following the use of a firearm, baton, chemical mace, or in situations that result in death or serious injury.

Our examination of this general order indicates that it does not set forth any specialized tactics or procedures that would permit individuals to simultaneously violate the law and avoid detection. We also note that in Gutman v. Pennsylvania State Police, 612 A.2d 553 (Pa. State. 1992), the Commonwealth Court of Pennsylvania found that State Police regulations concerning the use of deadly force were not protected from disclosure under an exemption applicable to "communications . . . which would disclose the institution, progress, or result of an investigation" by the State police.[6]

Accordingly, it is our opinion that General Order No. 804 is not a government record that must be confidential in order to avoid the frustration of the legitimate government function of law enforcement.

[6]In contrast, the court found that police regulations concerning the use of sobriety checkpoints, drug check-points, and intelligence gathering were protected from public disclosure, because "allowing individuals to discover such procedures and anticipate or discern drug and alcohol checkpoints could lead to tip-offs, thus endangering police personnel." Gutman, 612 A.2d at 556.

g. Use of Oleoresin Capsicum (OC) Spray (General Order No. 805)

This general order is divided into the following sections:

I. Purpose
II. Policy
III. Definition
IV. Procedures
V. Restrictions on Use
VI. Post-Use Decontamination & Treatment
VII. Required Reports
VIII. Responsibility

Based upon our careful examination of General Order No. 805, we believe that the following subsections of section IV, "Procedures," may be withheld from public inspection under section 92F-13(3), Hawaii Revised Statutes: A, B, C, D, G, I, J, and K. In our opinion, the public accessibility of these subsections of section IV could significantly undermine the Department's effective and safe use of Oleoresin spray as a humane method to disable violent individuals.

As such, it is our opinion that the above-referenced subsections of General Order No. 805 may be withheld from public inspection and copying under section 92F-13(3), Hawaii Revised Statutes, to avoid the frustration of the legitimate government function of law enforcement.

B. Records or Information Compiled for Law Enforcement Purposes

In Senate Standing Committee Report No. 2580, dated March 31, 1988, the Legislature set forth examples of information that may be withheld by an agency if its disclosure would result in the frustration of a legitimate government function. Among other examples, the Legislature mentioned "[r]ecords or information compiled for law enforcement purposes."

In determining whether the disclosure of records or information compiled for law enforcement purposes would result in the frustration of a legitimate government function, in previous opinion letters, we have relied upon Exemption 7 of FOIA for guidance.[7] FOIA's Exemption 7 was intended by Congress to

[7]Our reliance upon FOIA's Exemption 7 for guidance in construing the UIPA's exception for law enforcement records is consistent with decisions by courts in other states when

provide a workable and balanced formula to protect information that must remain confidential in order to protect legitimate government functions. Thus, it provides substantial guidance in determining whether law enforcement records must remain confidential in order to avoid the frustration of a legitimate government function. Exemption 7 of FOIA, as amended and strengthened by Congress in 1986, permits federal agencies to withhold in response to FOIA a request for:

> [R]ecords or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority . . . and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation . . . information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law

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construing open records law exceptions for law enforcement records. See, e.g., Citizens for Better Care v. Dep't of Public Health, 215 N.W.2d 576 (Mich. 1974); Lodge v. Knowlton, 391 A.2d 893 (N.H. 1978) (in absence of legislative standards, FOIA's Exemption 7 adopted for guidance); see also H. Stand. Comm. Rep. No. 342-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 969, 972 (1988) ("[w]ith regard to law enforcement records, your Committee considered the concerns from the police department and the press, and deleted this from the subparagraph in its entirety, adopting similar language from the federal [FOIA]"). We do not believe the Legislature intended to give categorical protection to all records or information compiled for law enforcement purposes. Had it meant to do so, it could have expressly provided an exemption for law enforcement records in section 92F-13, Hawaii Revised Statutes. Additionally, extending categorical protection to all law enforcement records would not be consistent with the purposes and policies underlying the UIPA.

> enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual.

5 U.S.C. § 552(b)(7) (1988) (emphasis added).[8]

[8]In 1986, Congress created an entirely new mechanism for protecting certain especially sensitive law enforcement matters under a new subsection (c) of the FOIA which provides:

> Whenever a request is made which involves access to records described in subsection (b)(7)(A) and --
>
> (A) the investigation or proceeding involves a possible violation of criminal law; and
>
> (B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,
>
> the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

5 U.S.C. § 552(c) (1988) (emphasis added).

When an agency receives a request for records covered by section (c) of FOIA, the agency may notify the requester that there exist no records responsive to the person's FOIA request:

> The (c)(1) exclusion now authorizes federal law enforcement agencies, under specified circumstances, to shield the very existence of records of ongoing investigations or proceedings by excluding them entirely from the FOIA's reach. To qualify for such exclusion from the FOIA, the records in question must be those which would

In order for a technique or procedure to be protected, under Exemption 7(E) it must not be already well known to the public. Examples of investigatory techniques previously held not protectible under Exemption 7(E) because courts have found them to be publicly known are "documentation appropriate for seeking search warrants before launching raiding parties" when this information has been revealed in court records, "mail covers," the "use of post office boxes," "security flashes," and the "tagging of fingerprints." Office of Information and Privacy, U.S. Department of Justice, Freedom of Information Act & Privacy Act Overview 258 (Sept. 1993).

(..continued)

> otherwise be withheld in their entireties under Exemption 7(A). Further, they must relate to an "investigation or proceeding [that] involves a possible violation of criminal law." Hence, any records pertaining to a purely civil law enforcement matter cannot be excluded from the FOIA under this provision . . . .
>
> Next, the statute imposes two closely related requirements which go to the very heart of the particular harm addressed through this record exclusion. An agency determining whether it can employ (c)(1) protection must consider whether it has "reason to believe" that the investigation's subject is not aware of its pendency and that, most fundamentally, the agency's disclosure of the very existence of the records in question "could reasonably be expected to interfere with enforcement proceedings."
>
> Obviously, where all investigatory subjects are already aware of an investigation's pendency, the "tip off" harm sought to be prevented through this record exclusion is not of concern.

Office of Information and Privacy, U.S. Dep't of Justice, Freedom of Information Act Guide & Privacy Act Overview at 272-273 (1993) (emphasis added, footnotes omitted).

The U.S. Department of Justice, Office of Information and Privacy's Freedom of Information Act Guide & Privacy Act Overview 260-61 n.15 (1993) provides examples of techniques and procedures that have qualified for protection under FOIA's Exemption 7(E):

> See, e.g., Bowen v. FDA, 925 F.2d 1225, 1228 (9th Cir. 1991) (release of specifics of cyanide-tracing techniques would present serious threat to future product-tampering investigations); Becker v. IRS, No. 91-C-1203, slip op. at 14-15 (N.D. Ill. Mar. 27, 1992) (protects investigatory techniques used by IRS to identify tax protesters) (appeal pending); Destileria Serralles, Inc. v. Department of the Treasury, No. 85-837, slip op. at 15 (D.P.R. Sept. 22, 1988) (technique for examining records of alcoholic beverage retailers "to determine whether discounts offered by a wholesale liquor dealer were used as a subterfuge for the giving of a thing of value to the retailer"); O'Connor v. IRS, 698 F. Supp. 204, 206-07 (D. Nev. 1988) ("tolerance and criteria used internally by the IRS in investigations"); Laroque v. United States Dep't of Justice, No. 86-2677, slip op. at 7-8 (D.D.C. July 12, 1988) ("reason codes" and "source codes" in State Department "lookout notices"); Luther v. IRS, No. 5-86-130, slip op. at 3-4 (D. Minn. June 8, 1987) (magistrate's recommendation) (alternative holding) ("IRS Discriminant Function Scores" used to select returns for audit), adopted (D. Minn. Aug. 13, 1987).

We do not believe that the general orders at issue in this opinion would constitute "techniques and procedures for law enforcement investigations or prosecutions," or would contain "guidelines for law enforcement investigations or prosecutions."

Accordingly, it is our opinion that the Department's general orders in the facts presented are not records or information compiled for law enforcement purposes that must remain confidential in order to avoid the frustration of a legitimate government function under section 92F-13(3), Hawaii Revised Statutes.

CONCLUSION

For the reasons set forth above, it is the opinion of the OIP that under section 92F-13(3), Hawaii Revised Statutes, the

Department may withhold access to General Order No. 528, and withhold portions of the other general orders involved in the facts presented.

Specifically, we find that sections V and VI of General Order number 602, "Motor Vehicle Pursuit," and subsections B, C, D, G, I, J, and K of section IV of General Order No. 805, may be withheld from public inspection under section 92F-13(3), Hawaii Revised Statutes.

In contrast, we find that the remaining portions of these general orders are reasonably segregable, and after the Department segregates those portions of the general orders that we have found to be protected from disclosure, the orders should be made available for public inspection and copying upon request, along with the other general orders which are available for public inspection in their entirety.

Please contact me at 586-1404 if you or your staff should have any questions regarding this opinion.

Very truly yours,

Hugh R. Jones
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

HRJ:sc
c: May McCullough
Citizens for Justice